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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

FRANCIS EDWIN BASS, JR., *et al.*,
Petitioners,
v.
STATE OF SOUTH CAROLINA, *et al.*

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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South Carolina does not, as it cannot, dispute the significance of the federal issue decided by the court below, *i.e.*, the retroactivity, *vel non*, of this Court's decision in *Davis* v. *Michigan Department of Treasury*, 479 U.S. 803 (1989). The importance of this issue is patent: wholly apart from the overriding jurisprudential considerations inherent in the retroactivity/prospectivity question, states are perpetuating the unconstitutional discrimination interdicted in *Davis* by applying that decision prospectively only, thus denying refunds to hundreds of thousands of retired federal employees in over twenty states. When retired federal employees have taken their state law refund claims to state court, the resulting *Davis* retroactivity opinions have left some claimants vindicated (*see, e.g.*, *Burns* v. *New Mexico*, No. SF 89-1314(c) (1st Jud. Dist., Santa Fe County), Letter Decision, April

5, 1990 (finding *Davis* to be retroactive; no appeal taken by state)), and others subjected to cursory dismissal (*see, e.g., Harper* v. *Commonwealth*, No. CL891080 (Cir. Ct. for City of Alexandria), Order, March 12, 1990, *appeal pend'g*, Nos. 900770, 900792 (Va.) (Virginia trial court applies *Davis* nonretroactively)), based solely upon the state in which the retiree happened to live these past few years. *See also* petition 7-10 (describing status of state court litigation). The necessity of Supreme Court review of this issue therefore cannot be seriously disputed.[1]

Rather than challenge the substantiality of the federal question relied upon below, the State proffers interrelated state law claims as supposed obstacles to this Court's jurisdiction. The State's effort to preclude this Court from reaching the paramount federal issue presented here is unavailing.

1. The State primarily argues that this Court cannot reach the issue of retroactivity of *Davis* because the court below relied alternatively upon independent state law grounds. Op. cert. 6-7. Yet the "independent state law ground" doctrine does not bar review where, as here, the asserted state law ground itself generates substantial and important federal questions. Thus, even had the decision below clearly relied upon a bona fide state law ground (despite all evidence to the contrary), this Court would nonetheless retain the power to review all the federal issues generated by the state law interpretations in question.

Regardless of whether the decision below is correct in its *current* interpretation of state law, petitioners pos-

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[1] Indeed, the Attorneys General of many of the affected states have themselves averred the importance of the *Davis* retroactivity issue in the *amicus curiae* briefs filed by them in other retroactivity cases before the Court. *See, e.g., Amicus Curiae* Brief of the States of Virginia, Colorado, Indiana, Iowa, Louisiana, Maine, Maryland, Minnesota, New Jersey, New York, Utah, Vermont and Wisconsin, filed in *James B. Beam Distilling Co.* v. *Georgia*, U.S. No. 89-680.

sessed a cognizable Due Process interest in their *previous* right, clearly expressed in the tax refund statute itself (*see* S.C. Stat. Ann. § 12-47-440), to claim income tax refunds by filing amended returns within three years of payment of the tax. *See Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 682 (1930). In view of the plain language of the statute, its administrative construction by the Tax Commission, and the prior decisions construing its breadth,[2] this about-face by the South Carolina Supreme Court, like the reversal of refund remedies at issue in *Brinkerhoff-Faris*, extinguished petitioners' preexisting rights and thus denied them Due Process.

Moreover, the state law ground purportedly asserted in the decision below abrogates petitioners' federal right to a "clear and certain remedy" for unconstitutional taxation. *McKesson* v. *Division of Alcoholic Beverages & Tobacco*, 110 S.Ct. 2238, 2251 (1990) (*quoting Atchison T. & S.F.R. Co.* v. *O'Connor*, 223 U.S. 280, 285 (1912)). Again, it is not necessary to second-guess the purported state law interpretation in the decision below, for the record demonstrates beyond cavil that petitioners were not afforded a "clear and certain remedy" for recovery of the disputed taxes. *See* Pet. 18-19 (listing, *inter alia*, petitioners' extensive basis for proceeding under § 12-47-440, and the utter lack of forewarning that they would be relegated exclusively to the "payment under protest" procedures). Given the existence of these federal questions arising from the alleged state law grounds below, the State's argument poses no impediment to review.

2. Not only does the existence of these federal issues remove any obstacle ostensibly presented by state law, they independently merit review by this Court. *McKesson* reiterated the right of taxpayers to obtain "meaningful

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[2] *See Pet.* 18-19 and note 10 (South Carolina Tax Commission affirmatively encouraged petitioners to file for refunds under § 12-47-440; plain language of § 12-47-440 encompasses income tax refund actions). *See also* note 5, *infra*.

backward-looking relief" when a tax is unconstitutional. 110 S.Ct. at 2247. Balanced against this, the Court also explained that states may preserve their ability to "engage in sound fiscal planning" by imposing various procedural limitations including "payment under protest" requirements. *Id.* at 2254. While the Court plainly anticipated that any transition to such "pay under protest" regimes would take effect "in the future" (*id.* at 2257), and apply in "future cases" (*id.* at 2254), some states have attempted to newly impose such limitations on otherwise proper tax refund actions pending at the time *McKesson* was decided.[4] A state's *post hac* invention of additional state procedural requirements is in sharp conflict with the constitutional command that taxpayers be afforded a "clear and certain remedy."

This case is the first to come to this Court construing the remedial guidelines delineated in *McKesson*. Review by this Court is especially appropriate to elucidate the permissible constraints on relief in income tax refund cases such as this.

3. Even aside from the important federal questions engendered by the purported state law grounds referenced in the decision below, respondents' reliance on *Michigan* v. *Long*, 463 U.S. 1032 (1983), is misplaced, as

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[4] For example, in Mississippi, federal retirees had already filed refund claims in light of *Davis* when the State enacted legislation purporting to declare that discriminatory taxes upon federal annuities could not be recovered under the otherwise applicable tax refund statute. *See* Mississippi Code § 27-7-313 (Supp. 1990). In fact, the Mississippi Legislature went even further, requiring federal retirees to pay the discriminatory taxes for the entire 1989 tax year, well after this Court invalidated such taxes in *Davis* in March of 1989. *Ibid.* In Virginia, the Commonwealth has gone so far as to allege that federal retiree refund claims may be denied on the unprecedented basis that Virginia state courts possess complete discretion to deny otherwise proper refund claims for any reason. *See* Appellee's Brief at 29, *Harper* v. *Department of Taxation*, Nos. 900770, 900792 (Va.) (filed November 13, 1990).

there is no "clear and express" statement of "bona fide separate, adequate and independent [state law] grounds" in the decision. *Id.*, 463 U.S. at 1041.[4] *See American Trucking Ass'ns* v. *Smith*, 110 S.Ct. 2323, 2330 (1990) (rejecting assertion that adequate state law grounds independently supported denial of refunds.)

The apparent reliance on state law in the decision below is not "clear," for the court below concludes its decision with an explicit abnegation of reliance on state law: "Because we find that *Davis* is not to be retrospectively applied, we do not need to engage in an analysis of state law." Pet. 9a. The state law ground also is neither "bona fide" nor "adequate." As to the observations by the court below that, according to state law, petitioners proceeded under the wrong refund statute and failed to satisfy the "pay under protest" requirement (Pet. 9a), all indications are to the contrary. *See* Pet. 18-19 (South Carolina Tax Commission affirmatively encouraged petitioners to file for refunds under § 12-47-440; plain language of § 12-47-440 encompasses income tax refund actions).

Supreme Court review is not pretermitted where, as here, the purported state law ground is untenable, or is "so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a

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[4] Contrary to the State's intimation, Op. cert. 2, at no point in the proceedings below did the State either raise, brief or argue the determinative holding below, that § 12-47-440 does not apply to income taxes. *See* Pet. 9a n.5. Rather, it argued, as it still does today (*see* Op. cert. 12-15), that petitioners' rights for refunds of 1985 through 1988 income taxes under § 12-47-440 were extinguished through passage of § 12-47-445 in 1989. *See* Op. cert. 4a (text of § 12-47-445) (purporting to limit § 12-47-440 to non-constitutional challenges). Had this issue been raised, in addition to providing their arguments on this score, petitioners could also have raised the issue of estoppel arising out of the Tax Commission's public advice to federal retirees to utilize the "amended returns" provisions of the code (*i.e.*, § 12-47-440) to protect their refund rights. *See Oswald* v. *County of Aiken*, 315 S.E.2d 146, 150 (S.C. App. 1984); Pet. at 29a-35a.

review of the decision upon the federal question." *Enterprise Irrigation District* v. *Canal Co.*, 243 U.S. 157, 164 (1917). *See also Lawrence* v. *Tax Comm'n of Mississippi*, 286 U.S. 276, 282-83 (1932). This caution fully applies here: the court below did not include any reference to state law grounds until *after* this Court's decisions in *American Trucking Ass'ns* v. *Smith*, 110 S.Ct. 2323, and *Ashland Oil Co.* v. *Caryl*, 110 S.Ct. 3202 (1990), raised serious doubt about the validity of the state court's retroactivity analysis. *Compare* Pet. 8a-9a (post-*American Trucking Ass'ns* decision discusses state law) *with* Pet. 19a-20a (pre-*American Trucking Ass'ns* decision contains no discussion of state law).[5]

Finally, to the extent the court below referred to state law grounds, they could not be "independent" grounds, for the decision on its face reveals a reliance upon the contours of federal law. Specifically, the court below

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[5] While the court below stated that it had previously held that §§ 12-47-210 and 220 were the exclusive means of obtaining income tax refunds, Pet. 9a, this is not so. In fact, the authority cited does not remotely support this proposition. *See Perpetual Bldg. and Loan Ass'n of Columbia* v. *South Carolina Tax Commission*, 180 S.E.2d 195 (S.C. 1971) (holding merely that taxpayer who had reported no income tax due had to pay assessment before instituting a challenge under predecessor statutes to §§ 12-47-210 and 220). Moreover, the court's statement that § 12-47-440 "deals only with the recovery of license fees and taxes," Pet. 9a n.5, flatly contradicts several earlier holdings of the court. *See, e.g., Shasta Beverages* v. *South Carolina Tax Comm'n*, 310 S.E. 2d 655, 656 (S.C. 1983) (granting refund of soft drink taxes under § 12-47-440); *Bobo Brothers, Inc.* v. *South Carolina Tax Comm'n*, 244 S.E. 2d 519, 520 (S.C. 1978) (payment of income taxes is a prerequisite to refund action under § 12-47-440). *See also Slater Corp.* v. *South Carolina Tax Comm'n*, 314 S.E. 2d 31, 33 (S.C. App. 1984) (granting refund of sales tax, holding "Section 12-47-440 provides [for the] application for refund of *any* tax or license fee" (emphasis added)). The only authority cited by the court as precedent for the unavailability of § 12-47-440 here, *City of Columbia* v. *Glens Falls Insurance Company*, 139 S.E.2d 529, 531-32 (1964), involved business license taxes and not income taxes, but did cite the breadth of the predecessor of § 12-47-440 to construe another refund provision narrowly.

sought to calibrate its holding with *McKeeson*'s sanction of procedural limitations upon the exercise of tax refund rights. *See* Pet. 9a. Where, as here, the purported state law ground is "interwoven with the federal law" (*Michigan* v. *Long*, 463 U.S. at 1041), there is no bar to certiorari review. *See, e.g., Ake* v. *Oklahoma*, 470 U.S. 68, 75 (1985) ("when resolution of the state procedural law question depends on a federal constitutional ruling, the state law prong of the [state] court's holding is not independent of federal law, and our jurisdiction is not precluded").

4. The State also contends that petitioners' interest in the *Davis* retroactivity issue is "not substantial" because the taxes in question were paid "voluntarily," and "there is no constitutional right to recover taxes voluntarily paid." Op. cert. at 4-6.[6] *McKesson* conclusively dispatches this assertion: if a tax must be paid before it may be challenged, and penalties attend its nonpayment, then payment of the tax is deemed paid "under duress." 110 S.Ct. at 2251 and n.21. A tax paid "under duress" is not "voluntary." *Ibid.* South Carolina's tax refund statutes require payment of a tax before the tax may be challenged (*see* Op. cert. 1a-4a (providing text of South Carolina refund statutes)), and impose penalties for nonpayment (*see* § 12-7-2720); in other words, there is no "predeprivation" opportunity for taxpayers' "objections [to be] entertained and resolved." *McKesson*, 110 S.Ct. at 2251. As summarized in *McKesson*:

> If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a post-payment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

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[6] The court below similarly labored under the misapprehension that "the payments made by the federal retirees were voluntary, not coerced." Pet. 8a n.4.

110 S.Ct. at 2247 (footnotes omitted). Accordingly, the State's belittling of petitioners' federal interest due to purportedly "voluntary" payment of the discriminatory taxes in question is erroneous as a matter of federal law.[7]

CONCLUSION

For the foregoing reasons, and for those set forth in our petition, the petition for a writ of certiorari to the Supreme Court of South Carolina should be granted.

Respectfully submitted,

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[7] The State also argues that the passage of § 12-47-445 in June 1989 deprived petitioners of any right to seek refunds under state law. Op. cert. 12-15. This contention also is based on the misconception that taxes not paid under protest are voluntary. In any event, this argument was rejected by the trial court (Tr. 88-91), and was not passed upon by the State Supreme Court. Accordingly, it is of no consequence here.